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No. 16-405

In the

Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Montana

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MONTANA CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2(b), the Chamber of Commerce of the United States of America, Montana Chamber of Commerce, National Federation of Independent Business, and American Tort Reform Association respectfully move for permission to file the attached brief for *amici curiae*. Counsel for petitioner has consented to the filing of this brief. Counsel for one of the respondents has refused

consent; counsel for the other respondent has not responded to movants' repeated requests for consent.

Movants represent a diverse array of companies that conduct business across the United States and around the world. Movants' members thus have a keen interest in the predictability that comes when courts follow fair rules for personal jurisdiction and abide by the decisions of this Court. The Montana Supreme Court's decision fails on both counts. By holding that the due process guarantees reaffirmed in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), do not apply to U.S.-based defendants, the Montana Supreme Court has essentially ignored this Court's general personal jurisdiction holdings and created significant uncertainty for businesses as to where they may be haled into court for actions taken anywhere in the world.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. Ninety-six percent of the U.S. Chamber's members are small businesses with fewer than one hundred employees. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community. The U.S.

Chamber has participated as *amicus curiae* in every significant personal jurisdiction case recently decided by this Court, including *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Daimler*, *supra*, and *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and has filed briefs in a host of lower federal and state court cases applying those decisions. The U.S. Chamber's recent *amicus curiae* briefs in personal jurisdiction cases are available at http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction.

The Montana Chamber of Commerce ("Montana Chamber") is Montana's largest business federation, representing more than 1,500 business members ranging from small, mom-and-pop operations to large corporations. Member businesses participate in virtually every sector of the economy, including retail, manufacturing, tourism, and agriculture. The Montana Chamber works to improve Montana's business climate. As part of its mission, the Montana Chamber files briefs as *amicus curiae* in order to provide courts with the perspective of the broader business community on issues relevant to Montana's ability to attract private sector investment. Indeed, given the importance of this case, the Montana Chamber previously filed an *amicus curiae* brief in support of petitioner with the Montana Supreme Court.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing approximately 325,000 member businesses in Washington, DC and

all fifty state capitals. Founded in 1943 as a nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will affect small businesses.

Founded in 1986, American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

Respectfully submitted,

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AMICI ON THIS BRIEF

Chamber of Commerce of the United States of America

Montana Chamber of Commerce

National Federation of Independent Business

American Tort Reform Association

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STATEMENT OF INTEREST[1]

The interest of *amici curiae* the Chamber of Commerce of the United States of America, the Montana Chamber of Commerce, the National Federation of Independent Business, and American Tort Reform Association is set forth in the Motion for Leave to File a Brief, which is filed along with this brief.

SUMMARY OF THE ARGUMENT

This Court made unmistakably clear in *Daimler AG v. Bauman* that a state court may subject a defendant to general personal jurisdiction only where the defendant's "affiliations with the State in which suit is brought" are "so constant and pervasive 'as to render [it] essentially at home in the forum State.'" 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Court explained that, absent "exceptional" circumstances, a "foreign corporation" is "at home," and thus subject to "all-purpose" jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924. And the Court left no doubt that its references to "foreign corporations" and the Due Process Clause extend equally to corporations based

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici curiae*'s intent to file this brief.

in a "sister-state" as well as "foreign-country" corporations. *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).

Thus, when respondents—neither of whom are residents of Montana—sued Texas-based petitioner BNSF Railway Company in Montana for claims having no relation to Montana, the cases should have been swiftly dismissed, with the dismissals just as swiftly affirmed on appeal. To be sure, before this Court's recent decisions, BNSF's normal course of business in Montana might have been enough to subject the company to personal jurisdiction there on any claim arising anywhere in the world. But *Daimler* explicitly rejected the notion that a company's "substantial, continuous, and systematic course of business" in a forum could be enough to subject a company to personal jurisdiction on any claim arising anywhere. *Id.* at 761. Indeed, *Daimler*'s characterization of that very test as "unacceptably grasping," *id.*, should have led the Montana Supreme Court to conclude that BNSF is not subject to general personal jurisdiction in Montana.

But old habits die hard, and the Montana Supreme Court "decline[d]" to apply the straightforward language of *Daimler* here. Pet.App.15a. Instead, the court asserted that the decision had no purchase in BNSF's case because *Daimler* addressed only the narrow question of "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign* defendant based on events occurring entirely *outside the United States*." Pet.App.11a (emphases added).

And because BNSF is a U.S.-based defendant, the Montana high court reasoned, *Daimler* was "factually and legally distinguishable." Pet.App.15a.

As dissenting Justice McKinnon cogently explained, that reasoning is spectacularly flawed. Pet.App.20a-33a. Neither *Daimler* nor the guarantees of the Due Process Clause are limited to international defendants. Indeed, the Court made explicit that its holding applies to both "sister-state" and "foreign-country ... corporations." *Daimler*, 134 S. Ct. at 754. The Montana Supreme Court's contrary conclusion cannot stand.

The Montana Supreme Court's other rationale for subjecting BNSF to general personal jurisdiction in Montana is equally confounding. The plaintiffs alleged violations of the Federal Employers' Liability Act (FELA), which creates a right of action for railroad employees against their employers for injuries that occur on the job. FELA contains a generous venue provision that gives plaintiffs a broad selection of federal-court venues, and makes clear that state and federal courts have "concurrent jurisdiction" to hear the federal claims. 45 U.S.C. §56. The Montana Supreme Court held that this *venue* provision "make[s] a railroad 'at home' for *jurisdictional* purposes wherever it is 'doing business.'" Pet.App.12a (emphases added). But venue and jurisdiction are fundamentally different matters. "[P]ersonal jurisdiction ... goes to the court's power to exercise control over the parties" and is thus "typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S.

173, 180 (1979). Moreover, personal jurisdiction, unlike venue, is a fundamental constitutional prerequisite for the exercise of adjudicators' power. In short, personal jurisdiction precedes venue; venue cannot exist where there is no personal jurisdiction; and FELA's venue provision did not and could not expand a state court's power to subject out-of-state defendants to its jurisdiction.

The Montana Supreme Court's conception of general personal jurisdiction is not only irreconcilable with this Court's precedent. It also raises exactly the kinds of unfairness problems that this Court sought to rectify in its previous personal jurisdiction holdings. The Court has repeatedly recognized the practical need for simple and fair jurisdictional rules, and *Daimler*'s test for determining where a defendant is subject to all-purpose jurisdiction fits that bill. These predictable rules help potential defendants structure their conduct, guide potential plaintiffs to an appropriate forum for litigation, and assist all parties in efficiently litigating the actual merits of their claims, rather than engaging in costly threshold disputes over where the claims can be heard. Montana's novel approach, on the other hand, demands fact-intensive jurisdictional inquiries and subjects nearly every company that does some business in Montana to the risk that it could be haled into a Montana court for any action it takes anywhere in the world. The resulting uncertainty fosters massive inefficiencies and is critically unfair for defendants, especially for small businesses, which frequently lack the resources to adequately defend themselves in expensive litigation in distant and unfamiliar forums.

Finally, this case represents only the latest attempt by the Montana Supreme Court to defy the decisions of this Court. The Montana court has repeatedly relied on tenuous readings of this Court's precedents to try to exempt the state from rulings of this Court with which it disagrees. And this Court has repeatedly and justifiably intervened to make clear that the Constitution applies with full force in Montana as it does in every other State. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012). The Montana Supreme Court's attempts to distinguish *Daimler* here are similarly unavailing and warrant the same result. Indeed, the decision below is of a piece with other recent decisions by state supreme courts circumventing this Court's jurisdictional rulings on the flimsiest of grounds. These decisions signal a troubling trend that threatens to undo this Court's jurisprudence and sow the very confusion and unfairness this Court has endeavored to eliminate. The Court should arrest this nascent movement by granting BNSF's petition and holding that constitutional due process is not subject to geographic or statutory carve-outs.

ARGUMENT

I. The Montana Supreme Court's Decision Ignores This Court's Clear Holdings Regarding General Personal Jurisdiction.

The Due Process Clause of the Fourteenth Amendment prohibits a state from authorizing its courts to exercise personal jurisdiction over an out-of-state defendant unless the defendant has "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional

notions of fair play and substantial justice." *Daimler*, 134 S. Ct. at 754 (brackets omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also* Fed. R. Civ. P. 4(k)(1)(A) (permitting district court jurisdiction over defendant subject to jurisdiction in court of forum state).

"[T]wo categories of personal jurisdiction" guide the application of the minimum contacts test. *Daimler*, 134 S. Ct. at 754. Specific personal jurisdiction applies when the suit "arises out of or relates to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 923-24. For a state to exercise specific personal jurisdiction consistent with due process, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

General personal jurisdiction, on the other hand, allows a court to hear "any and all claims against [the defendant]." *Daimler*, 134 S. Ct. at 751. For this "all-purpose" jurisdiction to be appropriate, however, the defendant's "affiliations with the State in which suit is brought" must be "so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Id.* (quoting *Goodyear*, 564 U.S. at 919). Absent "exceptional" circumstances, a corporation is "at home," and thus subject to general jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924.

Daimler put to rest the misconception that state courts could exercise general personal jurisdiction based merely on "activities in the forum [that] are

'substantial' or 'continuous and systematic.'" *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011). Rejecting that approach as "unacceptably grasping," the Court clarified that the relevant inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 761 (brackets omitted) (quoting *Goodyear*, 564 U.S. at 919). Subjecting defendants to general jurisdiction in any other state "would not accord with the 'fair play and substantial justice' due process demands." *Id.* at 763 (quoting *Int'l Shoe*, 326 U.S. at 316).

The Montana Supreme Court's decision blatantly disregards this clear teaching and warrants summary reversal. Petitioner BNSF is a Delaware corporation with its principal place of business in Texas. Plaintiffs sued BNSF not in Delaware or Texas, but in Montana on tort claims that are unrelated to any of BNSF's activity in Montana. Pet.App.3a-4a. BNSF argued that the cases should be dismissed for lack of personal jurisdiction, but the Montana Supreme Court disagreed. Parroting the plaintiffs in *Daimler*, the court held that BNSF could be subject to general personal jurisdiction because "BNSF maintains substantial, continuous, and systematic contacts with Montana." Pet.App.17a. To explain away this Court's recent, on-point decision in *Daimler*, the court asserted that *Daimler* addressed only "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign* defendant based on events

occurring *entirely outside the United States*." Pet.App.11a (quoting *Daimler*, 134 S. Ct. at 750) (emphasis added). The Montana Supreme Court concluded that because plaintiffs' claims did not involve a foreign defendant or "torts that occur[red] in foreign countries," *Daimler* was "factually and legally distinguishable," and Montana state courts could exercise general personal jurisdiction over BNSF. Pet.App.11a, 15a.

That reasoning is spectacularly flawed. The Montana Supreme Court's tenuous justification for "declin[ing]" to follow *Daimler* is profoundly misguided at best, and willfully defiant at worst. Pet.App.15a. Nothing in *Daimler* remotely suggests that its holding regarding defendants' due process rights is limited to only international defendants. To the contrary, the Court made clear that the Due Process Clause protects all "out-of-state defendants" from "exorbitant exercises of all-purpose jurisdiction." *Daimler*, 134 S. Ct. at 761-62. The Court even made explicit that, when it referred to "foreign" defendants, it meant foreign in the sense relevant for the personal jurisdiction inquiry, namely, any out-of-state defendant, whether based in a "sister-state" or a "foreign-country." *Id.* at 754. There is no basis in the Constitution, this Court's decisions, or common sense for limiting due process protections to only the latter group.

The Montana Supreme Court's alternative rationale for ignoring *Daimler* is equally baseless. Plaintiffs brought their actions under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, which makes railroads liable to their "employees in

damages for injuries resulting in whole or in part from the fault of 'any of the officers, agents, or employees' of such carrier." *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 328 (1958) (quoting 45 U.S.C. §51). FELA was initially subject to the general venue statute, which fixed venue for suits brought in federal court in the district in which the defendant resided. Pet.App.6a (citing *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941)). Congress later added a venue provision to FELA that provides that plaintiffs may file "in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. §56. The section also makes clear that state courts can entertain FELA actions by providing that "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." *Id.*

It is hornbook law that "[t]he question of personal jurisdiction ... goes to the court's power to exercise control over the parties," while the question of "venue ... is primarily a matter of choosing a convenient forum." *Leroy*, 443 U.S. at 180. "This basic difference between the court's power and the litigant's convenience is historic in the federal courts." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Nevertheless, the Montana Supreme Court seized on FELA's venue provision to conclude that "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business.'" Pet.App.12a. This reasoning represents a clear and erroneous conflation

of venue and jurisdiction. Venue provisions like 45 U.S.C. §56 do not (and cannot) expand personal jurisdiction; rather, they "come into play only after jurisdiction has been established." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985). Thus, "Congress did not, nor could it, ... confer personal jurisdiction with the passage of 45 U.S.C. §56." Pet.App.29a (McKinnon, J., dissenting).

Attempting to avoid this obvious conclusion, the Montana Supreme Court relied on equivocation, noting that "45 U.S.C. §56 does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction ...." Pet.App.14a. But as Justice McKinnon recognized in her dissent, "'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet.App.30-31a (citing statutory and judicial authorities). Thus, this Court has repeatedly contrasted "concurrent jurisdiction" with "exclusive federal court jurisdiction over cases arising under federal law," a comparison that turns on the *nature* of the claim, not the *territory* in which the claim is brought. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962); *see also Tafflin v. Levitt*, 493 U.S. 455, 467-68 (1990) (discussing whether "Congress intended exclusive federal jurisdiction" or "concurrent state court jurisdiction" over federal RICO claims); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("[I]f exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take

it."). The Montana Supreme Court's indefensible misreading (or mischaracterization) of "concurrent jurisdiction" fails to advance its equally untenable position that FELA defendants are not entitled to full due process rights.

Similarly, the Montana Supreme Court claimed to identify "decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet.App.12a. But as Justice McKinnon correctly noted, the majority "arrive[d] at this conclusion *without citing a single* general jurisdiction case." Pet.App.27a. Instead, the majority relied on two decisions that involved only the issue of whether state courts could enjoin an otherwise legitimate FELA action filed in another state court on grounds that the plaintiff's choice of venue was oppressive or inconvenient, *see Pope v. Atl. Coast Line R. Co.*, 345 U.S. 379, 383 (1953); *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698, 699 (1942), and one decision that concerned whether allowing a FELA action to proceed would impose "an undue burden on interstate commerce." *Denver & R. G. W. R. Co. v. Terte*, 284 U.S. 284, 285 (1932). "These cases do not so much as mention the Due Process Clause or general jurisdiction," Pet.App.28a (McKinnon, J., dissenting), which is unsurprising, as FELA cannot negate the "individual liberty interest preserved by the Due Process Clause." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

The Montana Supreme Court's decision is even more inexplicable considering how many other

federal courts of appeals and state courts of last resort have recognized that "*Daimler* makes clear the demanding nature of the standard for general personal jurisdiction over a corporation." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014); *see, e.g.*, *Kipp v. Ski Enter. Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015) (noting *Daimler*'s "stringent criteria"); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (noting that, in light of *Daimler*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business"). Thus, "except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016).

The Montana Supreme Court, however, never suggested that BNSF's case was in any way "exceptional," *Daimler*, 134 S. Ct. at 761 n.19, nor would there have been any grounds for such a holding. This Court has identified only one such "exceptional case"—*Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952). *Perkins* involved a Philippines-based corporation that temporarily conducted its business from Ohio during the Japanese occupation of the Philippines in World War II. *Daimler*, 134 S. Ct. at 756 & n.8. The *Perkins* Court held that the company's contacts with Ohio were so continuous and systematic that "Ohio could be considered 'a surrogate for the place of incorporation or head office.'" *Id.* But this set of circumstances is so "exceptional" that, post-*Daimler*, *amici* are aware of no federal circuit court that has

identified a similarly exceptional case warranting the exercise of general personal jurisdiction. And given that BNSF operates rail lines in 28 states, Pet.6, "general jurisdiction would be quite the *opposite* of 'exceptional' if such contacts were held sufficient to render the corporation 'at home' in the state." *Brown*, 814 F.3d at 630. Yet the Montana Supreme Court held that BSNF is "at home" in Montana only because it is "doing business" there, Pet.App.12a, a clear confirmation that the court's decision cannot be squared with any reasonable reading of *Daimler*.

II. The Montana Supreme Court's Decision Reintroduces The Unfairness And Uncertainty This Court Has Sought To Eliminate.

"The Due Process Clause, by ensuring the 'orderly administration of the laws,' ... gives a degree of predictability to the legal system" for potential defendants. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Int'l Shoe*, 326 U.S. at 319). And, as the Court has noted, "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). *Daimler* promoted this predictability for defendants, recognizing that it "is one thing to hold a corporation answerable for operations in the forum State, ... quite another to expose it to suit on claims having no connection whatever to the forum State." *Daimler*, 134 S. Ct. at 761 n.19. After all, if corporations could be subjected to all-purpose jurisdiction for merely doing "substantial, continuous, and systematic" business in a state, it would be well-nigh impossible for them "to

structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

The Montana Supreme Court cast aside these concerns when it resurrected the "substantial, continuous, and systematic contacts" standard for U.S.-based defendants. Pet.App.17a. By imposing "exorbitant exercises of all-purpose jurisdiction," the decision below has created uncertainty for all U.S. businesses operating in Montana, as they face the prospect of being haled into Montana courts to answer for conduct that occurs anywhere in the world. And each day the decision stands, that uncertainty grows for all companies operating in the United States, as the Montana decision serves as a template for enterprising plaintiffs and courts that would seek to limit *Daimler* to only certain causes of action or certain classes of "foreign" defendants. *See, e.g.*, *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 333 (W. Va. 2016) (noting that that "the Court in *Daimler* paid significant attention to the 'transnational context' of the dispute" and remanding for jurisdictional discovery).

The predicament that a company like BNSF now faces illustrates one of the practical reasons for concluding that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20. BNSF operates in 28 states and 2 Canadian provinces. Pet.6. Only about 2,000 of the 32,500 miles of railroad track that BNSF operates are located in

Montana, and less than 10% of the company's revenue is generated there. Pet.App.63a. But because the Montana Supreme Court carved a gaping hole in *Daimler*, BNSF can expect to be haled into Montana for at least all FELA claims and likely other claims that arise from actions BNSF takes anywhere in the United States if not the world. Moreover, the prospect of such unpredictable and potentially costly litigation is particularly daunting for small businesses, which often lack the resources to adequately defend themselves in distant and unfamiliar forums. Thus, unless this Court reverses the Montana Supreme Court's decision, it will be impossible for BNSF and other "[potential] defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762.

The Montana Supreme Court's decision also needlessly reintroduces complex factual inquiries into what should be clean-cut jurisdictional analyses. When the Court explained in *Daimler* that a corporation is typically at home only where it is incorporated or has its principal place of business, it noted that these "affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." 134 S. Ct. at 760. Such "[s]imple jurisdictional rules ... promote greater predictability," *id.*, which is beneficial both to potential defendants structuring their affairs and to "plaintiffs deciding [where] to file suit," *Hertz*, 559 U.S. at 95. The Montana Supreme Court's decision, however, moves past these "paradig[m] ... bases for general jurisdiction," *Daimler*, 134 S. Ct. at 760, and

requires investigation into whether "[a] nonresident *defendant ... maintains 'substantial' or 'continuous* and systematic' contacts with Montana." Pet.App.16a. This "factually intensive" inquiry, *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 339 (5th Cir. 1999), is sure to "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 559 U.S. at 94.

Finally, the Montana Supreme Court's decision imposes unnecessary burdens on state courts, opening them up to claims that have nothing to do with their state. Indeed, one of the trial court judges below complained that he alone had "about 12 FELA cases pending where the Plaintiff is not a Montana resident and where there are no Montana related acts or omissions." Pet.App.36a-37a. While "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," *Burger King*, 471 U.S. at 473—albeit an interest that cannot negate an out-of-state defendant's due process rights—Montana has no similar interest in ensuring that nonresident plaintiffs are made whole by nonresident defendants. *Cf. CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987) ("Indiana has no interest in protecting nonresident shareholders *of nonresident corporations.*"). Thus, fair play, substantial justice, and good sense dictate that such claims be brought where the cause of action arises or where the defendant is at home.

III. The Montana Supreme Court Has Repeatedly Defied The Decisions Of This Court, And It And Other State Courts Are Evading This Court's Jurisdictional Holdings.

"[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Thus, when this Court issues "an authoritative interpretation" of federal law, "the judges of every State must follow it." *Id.*; *see also* U.S. Const. art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

Daimler made clear that, except "in an exceptional case," an out-of-state corporate defendant can be properly subjected to general personal jurisdiction only where it has "its formal place of incorporation or principal place of business." 134 S. Ct. at 761 n.19. The Montana Supreme Court's reasons for nevertheless exercising general personal jurisdiction over an out-of-state defendant "fail to meaningfully distinguish that case," *Bullock*, 132 S. Ct. at 2491, and warrant summary reversal.

This is not the first time the Montana Supreme Court has relied on demonstrably dubious reasoning to defy the decisions of this Court. Just a few years ago, the Montana Supreme Court's willingness to discard controlling Supreme Court precedent was on display when the Montana court attempted to exempt Montana from the reach of *Citizens United v. FEC*, 558 U.S. 310 (2010). *See W. Tradition P'ship,*

Inc. v. Attorney Gen. of State, 271 P.3d 1 (Mont. 2011). Plaintiffs brought a First Amendment challenge to a Montana state law that prohibited "political expenditures by corporations on behalf of or opposing candidates for public office." *Id.* at 3. The Montana Supreme Court recognized that "[a] premise of *Citizens United* was that First Amendment protections extend to corporations." *Id.* at 5. But the court maintained that "*Citizens United* was a case decided upon its facts, and involved 'unique and complex' rules" that applied to federal elections. *Id.* The court then identified several aspects of Montana's history, economy, and geography that allegedly established that "Montana has unique and compelling interests" sufficient to sustain the statute under *Citizens United*. *Id.* at 11.

Two justices dissented. Justice Baker accused the majority of "inventing distinctions in what I fear will be a vain attempt to rescue Montana's" law. *Id.* at 14. Justice Nelson was even more critical, assailing the majority's "decision to parse *Citizens United* in a fashion so as to 'send a message' to, or be the next 'test case' before, the Supreme Court." *Id.* at 36. He blasted the majority's attempt to "render Montana exempt from *Citizens United*," as "disingenuous." *Id.* at 17, 36. He concluded by forecasting that, "[w]hen this case is appealed to the Supreme Court, ... a summary reversal on the merits would not surprise me in the least." *Id.* at 36 (citation omitted).

Fewer than six months later, this Court summarily reversed. *Bullock*, 132 S. Ct. at 2491. The Court held that "[t]here can be no serious doubt"

that "the holding of *Citizens United* applies to the Montana state law." *Id.* The Court noted that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Id.*

The Montana Supreme Court has also tried to exempt Montana from this Court's Federal Arbitration Act jurisprudence. In *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), the court refused to enforce a contractual arbitration provision because the provision did not comply with a state law that required arbitration provisions to appear on the front page of a contract. This Court granted, vacated, and remanded that decision for further consideration in light of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995), which reaffirmed that, under the FAA, states could invalidate arbitration clauses only on grounds that apply equally to any contract. *Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995). On remand, even though the Montana law clearly "singl[ed] out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Montana Supreme Court simply reinstated its opinion "without inviting or permitting further briefing or oral argument," *id.* at 686. This Court swiftly granted certiorari and reversed, holding that the Montana law was preempted by the FAA. *Id.* at 688-89.

While the Montana court's questionable reasoning in *Casarotto* could be interpreted as a subtle attempt to test the boundaries of this Court's reasoning, the reactions of two Montana justices to

the Court's second decision in the case made clear that outright insubordination drove their decisionmaking. After this Court sent the case back to the Montana Supreme Court a second time, two of the court's justices refused to sign a routine order remanding for further proceedings; they proclaimed that they could not "in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the U.S. Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Richard C. Rueben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16.

The Montana Supreme Court's decision in this case fits this pattern of defiance. The court meticulously, yet unconvincingly, parsed *Daimler* in a naked attempt to limit it to purely international disputes. The court likewise ignored basic hornbook law when it concluded that FELA's venue provision could expand personal jurisdiction at the expense of defendants' constitutional rights. But "foreign" in the personal jurisdiction context is used in contradistinction to the domestic or home-state forum and is synonymous with "out-of-state." Indeed, *Daimler* explicitly applies to both "sister-state" and "foreign-country ... corporations." 134 S. Ct. at 754. And just as "[t]here is no 'Montana exception'" to *Citizens United*, *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting), there are no FELA, U.S.-based-defendant, or Montana exceptions to *Daimler*.

The Montana Supreme Court is not alone in resisting the clear import of *Daimler*. While the Montana Supreme Court attempted to circumvent *Daimler* by recasting principles of general personal jurisdiction, several other courts similarly seeking "to mitigate the consequences of *Daimler*'s restrictions on general jurisdiction" have resorted to "a more liberal view of 'related contacts' for specific jurisdiction." Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 685 (2015). In so doing, the highest judicial tribunals in several other states have begun to dismantle this Court's careful limits governing state courts' exercise of personal jurisdiction and, consequently, to sow widespread confusion over the constitutional boundaries.

For example, the Supreme Court of California has sought to eviscerate the limits set by this Court on general jurisdiction through a sweeping expansion of specific jurisdiction. In *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016), the court addressed claims against nonresident defendants wholly unrelated to the defendants' contacts with California. This Court's decisions in *Daimler* and *Goodyear* foreclosed any reliance on general jurisdiction because the nonresident defendants were not "at home" in California, and indeed the California Supreme Court held that general jurisdiction would not lie. *Id.* at 883-84. Remarkably, though, the Court did not dismiss the claims. Instead, after paying lip service to this Court's recent general jurisdiction jurisprudence, a badly divided court

effected a blatant end-run around those decisions by adopting a capacious specific jurisdiction theory manufactured from whole cloth. Specifically, it announced a "sliding scale approach to specific [personal] jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim," such that specific personal jurisdiction may be appropriate even in the absence of a direct factual relationship between the plaintiffs' claims. *Id.* at 889.

Just as the California Supreme Court has obliterated the distinction between general and specific jurisdiction, the Supreme Court of Texas recently chipped away another bedrock principle of personal jurisdiction: the requirement that due process must be met as to each defendant, *see, e.g.*, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). In *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*, 493 S.W.3d 65 (Tex. 2016), nonresident domestic partnerships established subsidiaries in Delaware in order to facilitate the purchase of assets in Texas. The question before the Texas Supreme Court was whether those partnerships could be sued under a specific personal jurisdiction theory based upon the formation of subsidiaries in another state. Though this Court suggested in *Goodyear* and *Bauman* that one party's contacts might be imputed to another party under very limited circumstances, the plaintiffs in *Cornerstone* had waived any reliance on any such theory. That should have ended the case. Yet the Texas Supreme Court nonetheless upheld the exercise of specific jurisdiction because the

partnerships, through the creation of the Delaware subsidiaries, had "targeted Texas assets in which to invest and sought to profit from that investment." *Id.* at 73-74.

Cornerstone is not the only example of the renegade personal jurisdiction jurisprudence emanating from the Texas Supreme Court. In *T.V. Azteca S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), that court weakened other constitutional boundaries set by this Court on the use of the "effects" test to establish specific jurisdiction. *Azteca* involved whether the Texas courts could rely on the "effects" test to support specific jurisdiction over nonresident defendants. Although this Court had just recently narrowed the sweep of the "effects" test in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Texas Supreme Court overrode *Walden*'s limits. It invoked a version of the effects test that allowed the nonresident defendants' alleged efforts to "serve the market" in the forum to suffice. 490 S.W. at 46.

Much like the Texas court's dilution of the effects test and the relatedness requirement, Washington's highest court recently adopted an extraordinarily lax standard governing the exercise of specific jurisdiction over nonresident companies based upon the so-called stream-of-commerce theory. In *State v. L.G. Electronics, Inc.*, 375 P.3d 1035 (Wash. 2016) (en banc), nonresident companies manufactured component parts that other companies incorporated into finished products. Although this Court had recently rejected the New Jersey Supreme Court's expansive interpretation of the stream-of-commerce theory in *J. McIntyre Machinery, Ltd. v. Nicastro*,

564 U.S. 873 (2011), a divided Washington Supreme Court upheld the exercise of specific jurisdiction. It based its conclusion primarily upon the quantity of finished products flowing into the United States, including Washington, and containing defendants' component parts—a theory never embraced by a majority of this Court. *L.G. Electronics*, 375 P.3d at 1042-43.

These recent cases demonstrate that the Court needs to bring "specific jurisdiction ... into sharper relief," *Daimler*, 134 S. Ct. at 755, in order to ensure that courts do not "merely regenerat[e] general jurisdiction under a different name." Silberman, 19 Lewis & Clark L. Rev. at 685. But while it is bad enough that many courts have distorted specific personal jurisdiction to stage an end-run around *Daimler*, the Montana Supreme Court's decision goes a step further by brazenly ignoring *Daimler*'s clear teaching on general jurisdiction. As Justice Nelson of the Montana Supreme Court recognized when he broke with his colleagues five years ago, a state court must resist the "call ... to thumb its nose at the federal government, to disregard federal law, and to boldly ignore the Supremacy Clause." *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting). And when, as here, a state court has ignored federal law, it is imperative that the Court intervene to make clear that its decisions must be followed.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the decision below or, in the alternative, grant the petition for certiorari.

Respectfully submitted,

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